CAROLYN B. KUHL:
BRINGING BALANCE TO THE NINTH CIRCUIT

Regardless of which party controls the White House, the American people rightly expect that the President will nominate accomplished, intelligent, fair-minded candidates to fill vacancies in the federal judiciary. Above all, judicial nominees must be committed to the rule of law, and have a keen respect for the limited role of the federal judiciary in our system.

Regrettably, the Ninth Circuit has fallen short of that ideal all too often. Look no further than last year's notorious "Pledge of Allegiance" decision, in which the court ruled that the Pledge is unconstitutional because it contains the forbidden word "God."[1] Of the Ninth Circuit's 25 active judges, fully seventeen were appointed by Democratic presidents, fourteen of them by President Clinton. Just eight of the 25 judges—less than a third of the court's strength–are Republican appointees. No wonder that even Democratic Senator Charles Schumer agrees that the Ninth Circuit is "way out of the mainstream on the left side."[2]

By all accounts, Carolyn B. Kuhl lives up to the standards of judicial excellence from which the Ninth Circuit would benefit. Nominated by President Bush to the Ninth Circuit in June of 2001—nearly two years ago—Kuhl has proven herself to be an exceptionally skilled lawyer, a dedicated public servant, and a principled, restrained state-court judge. When Carolyn Kuhl takes her seat on the Ninth Circuit bench, she will bring balance to a court that desperately needs it. We urge the Senate to approve her nomination without delay.

A Distinguished Career

Carolyn Kuhl's career has been marked by a wide range of practice in different areas of the law, a commitment to public service, and extensive experience with the business of judging. Judge Kuhl's academic background is top-notch, having graduated from Princeton University in 1974 and from Duke Law School in 1977. Like most everything that Judge Kuhl went on to do, she completed her law school career with distinction—she served as Editor of the *Duke Law Journal*, graduated with honors, and was asked to join the Order of the Coif, the law-school equivalent of Phi Beta Kappa. Following law school she clerked for the Honorable Anthony M. Kennedy, at the time a judge on the Ninth Circuit.

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[1] *See Newdow v. U.S. Congress*, 321 F.3d 772 (9th Cir. 2003).

[2] *Congressional Record* S3694 (March 13, 2003) (statement of Sen. Schumer).

After working a brief time for a firm in Los Angeles, Judge Kuhl left private practice to serve her country as an attorney at the Department of Justice. She began her tenure as a public servant in 1981 as Special Assistant to Attorney General William French Smith. From 1982 through 1985, she served as Deputy Assistant Attorney General in the Justice Department's Civil Division, supervising all of the Department's civil appellate litigation nationwide. In 1985, Judge Kuhl became Deputy Solicitor General, where she argued a number of cases before the United States Supreme Court, as well as supervised other attorneys' work in cases before the Court.

In addition to her outstanding academic credentials and her years of government service, Judge Kuhl has extensive experience in private practice. After leaving the Justice Department, she became a partner in the Los Angeles law firm of Munger, Tolles & Olson. Her practice consisted of civil litigation in both federal and state court, with specialties in appellate litigation, representation of defense contractors in cases brought under the federal False Claims Act, and employment litigation.

In 1995, Kuhl was appointed to be a judge of the California Superior Court for Los Angeles County. Her tenure includes a year and a half of service in the criminal calendar court and over three years in the civil division. In 1999, she served for three months on assignment to the California Court of Appeal. In April of 2000 she was selected to participate in the Complex Litigation Pilot Program, and she became the program's Supervising Judge in January of 2001. She currently is the Supervising Judge for the entire civil division.

This career, which by all accounts is impressive, has well-prepared Judge Kuhl for the federal bench. She embodies all of the necessary prerequisites for a judge: intellect, experience, and respect for the judicial role in our constitutional structure. The American people expect that all federal judges will exhibit this level of excellence, and the Senate should swiftly confirm Judge Kuhl to the Ninth Circuit.

An Outstanding Judicial Record

Each of Judge Kuhl's decisions is characterized by well-reasoned analysis of the law coupled with a respect for the separation of powers. Her judicial record has earned her the respect of both her colleagues and the American Bar Association. Ninety-seven of Judge Kuhl's fellow state-court judges, representing both political parties and all points on the ideological spectrum, wrote in a letter to the Senate Judiciary Committee: "We have worked side by side with Judge Kuhl, have attended her judicial education presentations, talked with her about the law, and received reports from litigants who have appeared before her. We know she is a professional who administers justice without favor, without bias, and with an even hand."[3] It goes without saying that this bipartisan group of judges speaks about Judge Kuhl's fitness for the federal bench with greater authority than the usual Washington-based special interest groups. In addition to high praise from her colleagues, a large majority of the American Bar Association has rated

[3] Letter from 97 judges of the California Superior Court, Los Angeles County (Feb. 28, 2003).

Judge Kuhl well-qualified—a seal of approval that some Democrats in the Senate hail as their "gold standard."

A review of Judge Kuhl's decisions since she took the state bench makes clear that she has earned her reputation. In seven and a half years, only 127 of her cases have been appealed. And of those, her rulings have been upheld in their entirety 85% of the time, and upheld in part 7% of the time. This is a record that any judge would be exceedingly proud of. No wonder the special-interest groups, even after two years of dredging through Judge Kuhl's record, have failed to find any mud to sling—not even mud that would satisfy their low standards of believability. (One group's seven-page report managed to cite as problematic *just two cases* from Judge Kuhl's seven and a half years on the bench.) This dearth of credible criticism is proof positive that, whatever her personal political, moral, and religious views may be, Judge Kuhl is a principled and restrained jurist—traits that she is sure to bring with her to the Ninth Circuit.

One of the two cited cases, *American National Property and Casualty Co. v. Julie R.*,[4] is evidence of Judge Kuhl's commitment to precedent and the text of binding legal authorities. In that case (in which Judge Kuhl was sitting by designation with the Court of Appeal), the court ruled that a woman who was raped in her car was entitled to recover damages from her assailant and from his insurance company, but that her insurance policy did not authorize her to sue her own insurance company.

The policy at issue in *American National* covered only a narrow set of injuries, and read as follows: "We will pay damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an uninsured or an underinsured motor vehicle. The bodily injury must be caused by accident and result from the ownership, maintenance, or use of the vehicle." Judge Kuhl and a colleague agreed with the trial judge that the policy did not provide coverage, because there was no relationship between the policyholder's injuries and the use of the vehicle. Under long-settled California law, an insurance company is liable only if the use of the vehicle is a "predominating cause" or "substantial factor" in causing the injury.[5] And in this case, the car was not a "substantial factor" in causing the assault; rather, the predominating factors were the intent and actions of the assailant.[6]

Even the lone dissenting judge in *American National* agrees that Judge Kuhl is a fair, impartial jurist who can be counted on to apply the law evenly and without bias. In a letter to the Judiciary Committee, he emphasizes that Judge Kuhl is "a solid and independent judge who is dedicated to and

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[4] 76 Cal. App. 4th 134 (1991).

[5] *See, e.g., Aetna Casualty & Surety Co. v. Safeco Ins. Co.*, 103 Cal. App. 2d 694, 701 (1980) ("Although the word 'use' must be given an all inclusive connotation, there must be a causal connection between the use and the injury. The automobile is so much a part of American life that there are few activities in which the 'use of an automobile' does not play a part somewhere in the chain of events." (quoting *Truck Ins. Exch. V. Webb*, 256 Cal. App. 2d 140, 145 (1967))).

[6] 76 Cal. App. 4th at 141.

follows the law. . . . She will reason to a conclusion based on our Constitution, statute, and established precedent, rather than reason backward from some predetermined result."[7]

Predictably, the ususal Washington special interests have twisted the meaning of the *American National* case in an effort to portray Judge Kuhl as somehow hostile to rape victims.[8] Nothing could be further from the truth. The case was a civil action for money damages, not a criminal prosecution. The victim was not even suing the man accused of raping her. Rather, she was suing her own insurance company. And although Judge Kuhl—like her colleague on the appellate bench and the trial judge before her—held that the victim's own insurance company was not liable, nothing in that decision prevented the woman from seeking redress from the attacker himself.

The second cited case, *Sanchez-Scott v. Alza Pharmaceuticals*,[9] likewise reveals Judge Kuhl's commitment to the rule of law. Judge Kuhl's detractors evidently believe that, because the plaintiff in *Sanchez-Scott* was a sympathetic figure, Judge Kuhl should have ignored the requirements of the law and ruled in her favor. That would mean the end of the rule of law. In order for judges to apply the law fairly and even-handedly, they must interpret legal rules without regard to their emotions or any sympathy they feel for a party. That is why the appellate judge who later reversed Judge Kuhl has written a letter enthusiastically supporting her nomination, and explaining that her ruling was reasonable and unbiased: "With all respect to those who have criticized Judge Kuhl as being insensitive or biased because of my opinion in *Sanchez-Scott*, they are simply incorrect." Indeed, the appellate judge has since conceded that Judge Kuhl's ruling may have been right, after all: "a strong argument can be made that [Judge Kuhl] correctly assessed the competing societal interests the California Supreme Court requires all jurists in this state to weigh in determining whether the tort of intrusion has occurred."[10]

Everyone agrees that the plaintiff in *Sanchez-Scott* was not treated appropriately by her physician; the doctor admitted as much in a later letter of apology. But the legal issue was not whether the plaintiff was treated badly, but whether she had a legal claim against a third party who was not responsible for the doctor's misbehavior. During a scheduled appointment, the plaintiff's doctor entered the examining room with another gentleman, who was introduced as Mr. Martinez, "a person . . . who was looking at Dr. Polonsky's work."[11] (Martinez was a pharmaceutical salesman who was participating in a mentorship program, which even the appellate court agreed was a "well-established and accepted method of providing

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[7] Letter from Judge Norman Epstein to Senator Boxer (May 24, 2001).

[8] *See* NATIONAL WOMEN'S LAW CENTER, CAROLYN KUHL'S PROBLEMATIC RECORD ON REPRODUCTIVE CHOICE AND OTHER WOMEN'S ISSUES 4 (Mar. 2003) [hereinafter NWLC REPORT].

[9] *See* NWLC REPORT at 3.

[10] Letter from Paul Turner, Presiding Justice, California Court of Appeal (Mar. 17, 2003).

[11] *Sanchez-Scott v. Alza Pharmaceuticals*, 86 Cal. App. 4th 365, 369 (Cal. Ct. App. 2001).

training to therapeutic sales specialists."[12]) The plaintiff alleged in her complaint that during the exam, she became flushed and began to fan herself. The doctor took the fan from her and gave it to Mr. Martinez, explaining that it would "give him something to do." The plaintiff later explained that she became uncomfortable with the situation. But at the time, she did not inform her doctor of her discomfort, and allowed Mr. Martinez to remain in the room for the entire exam.[13] Judge Kuhl therefore found that, the presence of the mentorship participant in the exam room did not meet the standard for an invasion of privacy claim against the pharmaceutical company.

Judge Kuhl's ruling had nothing to do with the claims against the doctor, and would have allowed to go forward the plaintiff's tort claim against the doctor for failing to obtain informed consent. Nor did *Sanchez-Scott* in any way involve an issue of the constitutional right to privacy. Rather, Judge Kuhl was faced with several issues of first impression under California law relating only to the tort of intrusion. When looking to precedent for guidance, Judge Kuhl found that the California Supreme Court had not established a firm rule on the issue of intrusion. The court had suggested that judges must weigh the facts in each individual case: "privacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal recognition of our expectations of privacy."[14] The appellate judge likewise acknowledged in his letter that, "[i]n ruling on the demurrer, Judge Kuhl was required to apply what the California Supreme Court has characterized as degreed and nuanced rules of law involving relative concepts."[15]

Ultimately, Judge Kuhl concluded that the pharmaceutical representative did not invade the patient's privacy for two principal reasons. First, Martinez was participating in a mentorship program, whose purpose was to improve the delivery of health care. Second, the patient had effectively consented to the representative's presence in the exam room. In so ruling, Judge Kuhl carefully applied governing precedent from the California Supreme Court, which had held:

> Moreover, the plaintiff in an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant. If voluntary consent is present, a defendant's conduct will rarely be deemed "highly offensive to a reasonable person" so as to justify tort liability.[16]

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[12] *Id.* at 370.

[13] *Id.* at 369.

[14] *Sanders v. American Broadcasting Cos,. Inc.*, 85 Cal. Rptr. 2d 909, 915-16 (Cal. 1999).

[15] Letter from Paul Turner, Presiding Justice, California Court of Appeal (Mar. 17, 2003).

[16] *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 26 (1994).

Reasonable people certainly can disagree about whether Judge Kuhl reached the right result in the *Sanchez-Scott* case—indeed, the appellate judge who reversed her now thinks that she may have been correct. But there can be no disagreement that her ruling represents a scrupulous, reasonable effort to apply a complex and ambiguous body of law. The California Supreme Court has recognized that "the common law right of privacy is neither absolute nor globally vague, but is carefully confined to specific sets of interests that must inevitably be weighed in the balance against competing interests before the right is judicially recognized."[17] It should come as no surprise that reasonable minds can, and often do, disagree when applying such a shifting standard.

Judge Kuhl's Commitment to Eradicating Discrimination

Judge Kuhl's record as a California Superior Court Judge has demonstrated her personal commitment to fair treatment of all persons, to principles of non-discrimination, and to strict enforcement of the civil rights laws. For example, Judge Kuhl upheld a large damage award in *Francis Iwekaogwu v. City of Los Angeles*,[18] an employment discrimination and retaliation case where an employee suffered discrimination because of his race (African-American) and national origin (Nigerian). Leo James Terrell, the plaintiff's lawyer in *Iwekaogwu*—and an attorney for the NAACP and self-described lifelong Democrat—has written to "vigorously recommend" Judge Kuhl's nomination. He went on to say that he "found that Judge Kuhl was fair, impartial, competent and at all times, extremely professional."[19] But Judge Kuhl's own words are the best evidence of commitment to enforcing civil rights laws: "the Federal Government has and should play an aggressive, vigorous role in fighting discrimination. The civil rights laws have had a major impact in changing our society for the better, including by giving the Executive Branch the power to punish unlawful discriminatory conduct in employment, housing, government contracting and federal programs. The Government must continue to be a force for change by rooting out discrimination under its statutory mandates and bringing actions to compensate victims of discrimination."[20]

Having failed in their effort to identify decisions that could call into question Judge Kuhl's fitness for the federal bench, the special-interest groups have been forced to look almost entirely at her work as an advocate. They effectively are making the astonishing argument that Judge Kuhl's work as a lawyer is a better predictor of how she will rule as a Ninth Circuit judge than are her decisions as a state judge in California. In reality, of course, the groups' near-uniform focus on her record as a lawyer is proof positive that, whatever her personal views may be, she checks them at the door of the courthouse. And the record simply cannot support a contention that Judge Kuhl is anything less than fully committed to non-

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[17] *Hill*, 7 Cal. 4th at 26.

[18] 75 Cal. App. 4th 803 (1999).

[19] Letter from Leo James Terrell to Senators Feinstein and Boxer (May 23, 2001).

[20] Letter from Carolyn Kuhl to Senator Boxer (May 29, 2001).

discrimination and equality before the law.

Take, for example, the *Bob Jones* case.[21] In 1981, two religious schools argued before the Supreme Court that the IRS had unlawfully revoked their tax exempt status because of their discriminatory admission policies. Everyone agrees that these practices were repugnant. But racial discrimination per se was not at issue in the *Bob Jones* case. Rather, the question was one of administrative law: whether the IRS had the authority to revoke a school's tax exempt status on the ground that it contravened "public policy," or whether only Congress could do so.

Although Judge Kuhl's conclusion that the IRS lacked that power was based on an honest legal analysis, she has long since come to believe that her position was wrong: "The [Attorney General's] decision was wrong because it appeared insensitive to minorities, regardless of the nondiscriminatory motives of those involved in the decision." She also came to realize that because the IRS, which was the Justice Department's client, had a defensible legal position, the Justice Department had an obligation to defend it.[22] Former Solicitor General Charles Fried confirms that Kuhl had rethought her position on the *Bob Jones* case by 1985: "By the time Kuhl came to the office of the solicitor general as my deputy in 1985, I knew she had come to believe (as did I) that she had been wrong, if for no other reason than seeming to side with Bob Jones confused the Reagan Administration's message that we were strongly committed to civil rights and racial equality while opposed to quotas."[23]

Different officials in the United States government took different views of the case. Some believed that the IRS already had the authority to revoke the tax exempt status of discriminatory schools. Others believed that Congress had not yet delegated the IRS that power. The important point, however, was that everyone agreed that the IRS *should* have the power to take away Bob Jones's tax exempt status. One of Judge Kuhl's former colleagues recalls that "all agreed that racially discriminatory private schools should not be tax exempt, and draft legislation to that effect was prepared and proposed to Congress. [Kuhl and others] just believed that if the school was going to lose the tax exemption that it was entitled to under 501(c)(3), Congress and not the IRS should make that decision."[24] In fact, within days of announcing their decision in the *Bob Jones* case, the Reagan Administration proposed legislation that would "for the first time, give the Secretary of the Treasury and the Internal Revenue Service express authority to deny tax-

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[21] *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

[22] Letter from Carolyn Kuhl to Senator Boxer (May 29, 2001).

[23] Charles Fried, *Time-Traveling to Thwart a Judge*, L.A. TIMES, Jan. 17, 2003, at 17.

[24] Email from Charles Cooper, former Deputy Assistant Attorney General, Civil Rights Division, to David McGinley, Free Congress Foundation (July 9, 2001) (www.judicialselection.org/nominees/kuhl.htm).

exempt status to private, nonprofit educational organizations with racially discriminatory policies."[25]

It's no secret that Judge Kuhl believed that the IRS did not have unchecked discretion to determine which groups were morally deserving of a tax exemption. She was particularly concerned that the IRS might deny tax exempt status to all-girl schools on the ground they discriminated on the basis of sex. (Judge Kuhl had attended an all-girl high school.)[26]

Nor is it a secret that Judge Kuhl's views on the IRS's powers—i.e., that Congress, not unelected tax collectors, must determine that institutions with certain views will not receive tax exemptions—were well within the legal mainstream. Harvard Law Professor Lawrence Tribe, whom no one would mistake for a conservative, indicated in a letter to Attorney General William French Smith that he shared those views: "I have the highest regard for the quality of the brief submitted to the Supreme Court by the Department of Justice in the *Bob Jones* case. I thought it was a powerful and, in most respects, entirely compelling legal document."[27] Like the Justice Department, Professor Tribe believed that the IRS's policy exceeded its authority and needed to be backed by congressional action. And in his concurrence in the *Bob Jones* case, famously moderate Justice Lewis Powell argued that Congress, not the IRS, should develop national policy regarding tax exemption:

> [T]he balancing of these substantial interests is for Congress to perform. I am unwilling to join any suggestion that the Internal Revenue Service is invested with authority to decide which public policies are sufficiently "fundamental" to require denial of tax exemptions. Its business is to administer laws designed to produce revenue for the Government, not to promote "public policy." . . . [T]he contours of public policy should be determined by Congress, not by judges or the IRS.[28]

There is no merit to the proposition that Judge Kuhl was only "one of two" Justice Department officials who persuaded the Attorney General to reverse the IRS's policy. At the time of the case, Kuhl was 29 years old, had no decision-making authority, and came to the debate near the end of a process that involved numerous senior Administration officials. As a Special Assistant to the Attorney General, Kuhl was assigned to perform staff work for the Attorney General and other presidentially appointed Justice Department officials. As stated by Chuck Cooper, another young Department attorney, Judge Kuhl

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[25] *Reagan Proposes Bill to Prohibit Tax Exemption for Discriminatory Schools*, 14 TAX NOTES 218 (Jan. 25, 1982).

[26] Letter from Carolyn Kuhl to Senator Boxer (May 29, 2001).

[27] Letter from Laurence H. Tribe to Attorney General William French Smith (Feb. 10, 1984).

[28] *Bob Jones*, 461 U.S. at 611 (Powell, J., concurring).

"wasn't making policy, she was taking notes—when she and I were even in the room."[29]

With equally little foundation, some have proposed that Judge Kuhl's participation in *Local 28 of Sheet Metal Workers' Intern. Ass'n v. E.E.O.C.*[30] somehow constitutes evidence of a hostility to affirmative action. It would be difficult to concoct an allegation that has less basis in reality. Although it certainly is true that Kuhl, then the Deputy Solicitor General, was one of eight government attorneys listed on a Supreme Court brief challenging the appropriateness of rigid quotas, the government did not criticize affirmative action as such. (Curiously, Samuel Alito also worked on the *Local 28* brief when he was a government attorney. Yet in 1990 the Democrat-controlled Senate confirmed him to the Third Circuit. Those who raise the issue now are trying to hold Judge Kuhl to an unfair double standard.)

In *Local 28*,the trial court found that the union had violated Title VII by discriminating against minority workers, and therefore ordered various remedies—one of which was a rigid racial quota requiring that by a date certain a specific percentage (29.23%) of the union's members must be non-whites. In its Supreme Court brief, the United States *supported* each of the affirmative action remedies except for the quotas:

> We believe that those who violate Title VII should be made to take specific, affirmative steps to correct their discriminatory practices and ensure equal opportunity in the future. An effective remedial order can and should spell out the specific actions that a union or employer must undertake to reform identified discriminatory practices. It should provide for close monitoring of the future practices of those found to have been 'proved wrongdoers' under Title VII, until the court is satisfied that meaningful and permanent changes have been made.[31]

The only area of dispute in *Local 28* concerned the district court's requirement of membership quotas. And no one should confuse opposition to rigid quotas as opposition to affirmative action in general. Many noted liberals, including former President Clinton and former Vice President Gore have rejected the type of rigid quotas that were at issue in the *Local 28* case:

- **President Bill Clinton**: "I am against quotas, I'm against giving anybody any kind of preference for something they're not qualified for. . . . I have never supported quotas. I've always been against them."[32]

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[29] Jonathan Groner, *Going After the Bush Bench*, LEGAL TIMES, Feb. 1, 2002.

[30] 478 U.S. 421 (1986).

[31] Brief for Equal Employment Opportunity Commission at 18, *Local 28*, 478 U.S. 421 (1986) (No. 84-1656).

[32] Presidential Debate, Oct. 16, 1996 (www.pbs.org/newshour/bb/election/october96/debate/prez11_10-16.html).

- **Vice President Al Gore**: "I'm against quotas. . . . They're against the American way."[33]

- **Senator Joseph Lieberman**: "We shouldn't discriminate in favor of somebody based upon the group they represent. . . . It's an un-American argument because it's based on averages, not individuals. And that's the same when we come to group preferences and quotas. . . . I think we all want to say that we're against quotas and against group preferences, but that there ought to be some room for the kind of outreach that has been part of affirmative action programs without getting into quotas."[34]

- **Ismael Rivera** (President of American Association for Affirmative Action): "I'm a proponent of affirmative action, and I'm also against quotas."[35]

The government's brief in *Local 28* is characterized by due deference to binding Supreme Court precedent. Just two years prior, the Supreme Court had held that 42 U.S.C. § 2000e-5(g), the same provision at issue in *Local 28*, forbade racial preferences to individuals who had not been subjected to unlawful discrimination.[36] The government's argument in *Local 28* was based upon this Supreme Court case and the plain language in the statute which explicitly prohibits a court from ordering a union to admit an individual who was "refused admission . . . for any reason other than discrimination."[37]

Although Judge Kuhl's involvement in *Local 28* was as a Department of Justice attorney, and it therefore would be inaccurate to equate the United States' litigation position with her personal beliefs, it certainly is true that Judge Kuhl has written articles articulating her views on the types of remedies that best serve the purposes of Title VII. In these articles, she has favored a direct remedial approach that "emphasize[s] identification and elimination of employment practices that are barriers to hiring minority-group members and women, and on restoring victims of those discriminatory practices to the place they would have been, absent discrimination." According to Judge Kuhl, such an approach "recognizes individual dignity." And while Judge Kuhl has indicated that individual remedies are the best approach, she acknowledges that the Supreme Court has made generalized remedies available in certain circumstances. Judge Kuhl should be commended for thoughtfully contributing to the public debate on how to best

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[33] Presidential Debate, Oct. 17, 2000 (http://www.pbs.org/newshour/bb/election/2000debates/3rdebate5.html).

[34] Transcript of Comments Made By Sen. Joe Lieberman to The National Press Club in 1995 (found at www.newmassmedia.com/lieberman/affirm.html).

[35] Lynda Guydon Taylor, *Courts Play Role in Future of Affirmative Action*, PITTSBURGH POST-GAZETTE, Apr. 8, 2000, at W-3.

[36] *Firefighters v. Stotts*, 467 U.S. 561 (1984).

[37] 42 U.S.C. § 2000e-5(g).

overcome America's tragic legacy of racism and discrimination.

A Commitment to the Rights of Women

Judge Kuhl's professional accomplishments—degrees from two of the nation's top universities, dedicated government service, and a successful career in private practice—would be impressive achievements for any lawyer. They are even more remarkable given that the law traditionally has been a male-dominated profession. Judge Kuhl's seven-year tenure on the California bench has been marked by a commitment to protecting the legal rights of all litigants, including women. The Washington special interests have been unable to find anything to disqualify her in her judicial record, and therefore have tried to revisit cases she worked on as a young government attorney more than two decades ago. But again, that only serves to confirm that, whatever Judge Kuhl's policy views may happen to be, she is committed to setting them aside when she dons the black robe.

As an attorney for the United States, Judge Kuhl's obligation was to represent her client—the federal government, and ultimately the American people—to the best of her ability. A lawyer's job is to marshal whatever reasonable arguments can be made in support of her client. Lawyers do not have the luxury of picking and choosing what arguments to advance on the basis of their own personal views. This is especially true of attorneys for the federal government, who often are called on to defend laws and policies in whose development they played no part. Instead, the government lawyer must set aside whatever personal convictions she may have and advance arguments that are consistent with the decisions of her superiors.

Judge Kuhl did just that in *Thornburgh v. American College of Obstetricians and Gynecologists*[38]—a case in which, by all accounts, she played an exceedingly modest role. In *Thornburgh*, the Department of Justice defended the constitutionality of several states' popular, mainstream laws that preserved the right to abortion and sought to ensure that women were exposed to all relevant information before exercising that right. The laws required abortion providers to give their clients information about alternatives to abortion, as well as the attendant medical risks, before performing an abortion. According to a 1996 Gallup survey, fully 86% of Americans support this policy. Indeed, the Supreme Court upheld such a provision in *Planned Parenthood v. Casey*[39]—the same decision in which it reaffirmed *Roe v. Wade.*[40] Second, the laws required minor girls to obtain the consent of a parent before they could have an abortion. A 2000 *Los Angeles Times* poll indicates that 82% of Americans favor parental-consent laws. And the Supreme Court specifically upheld the constitutionality of such a provision

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[38] 476 U.S. 747 (1986).

[39] 505 U.S. 833, 881 (1992) ("Our prior decisions establish that, as with any medical procedure, the State may require a woman to give her written informed consent to an abortion.").

[40] 410 U.S. 113 (1973).

in the 1979 case of *Bellotti v. Baird*.[41]

Third, the laws required that, for post-viability fetuses, abortion providers must use the method most likely to result in a live birth. According to a 2002 Gallup study, fully 82% of Americans oppose abortion in the third trimester. Finally, the laws required abortion providers to inform their clients about the impact abortion would have on the fetus. The Supreme Court has explicitly recognized that states may impose such a requirement: "Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."[42]

While the laws at issue in *Thornburgh* enjoy the support of the vast majority of Americans, Judge Kuhl does not deserve credit for the Justice Department's efforts to defend them. For she played only a minor part in drafting the brief that Acting Solicitor General Charles Fried filed in that case. She did not author the brief, and her name is listed third on its cover. The initial draft was written by career lawyers in the Justice Department's Civil Division. Judge Kuhl, who was their supervisor, forwarded their draft to the Office of the Solicitor General. The Solicitor General's office then substantially rewrote the brief. In fact, Acting Solicitor General Fried has indicated that he personally wrote the portion of the brief that dealt with *Roe v. Wade*: "I decided to write the overrule-*Roe* part of the brief myself."[43]

Judge Kuhl thus was only one of many lawyers to work on the *Thornburgh* brief—and one of the least involved. Even interest groups determined to oppose President Bush's judicial nominees concede that briefs with multiple contributors shed no light on those individuals' personal views. People for the American Way recently emphasized that the briefs D.C. Circuit nominee Miguel Estrada authored at the Justice Department reveal nothing about his personal legal views, because "the briefs were documents that many people had worked on."[44] Sauce for the goose is sauce for the gander. If Miguel Estrada's briefs are not evidence of his personal views because "many people had worked on" them, then neither are Carolyn Kuhl's.

The newfound determination to criticize Judge Kuhl for her modest part in *Thornburgh* represents an unfair double standard. For Democrats have not objected to past nominees who had a much more active role in that case than she did. The first draft of the *Thornburgh* brief was written by Sixth Circuit

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[41] 443 U.S. 622 (1979) ("*Bellotti II*").

[42] *Casey*, 505 U.S. at 882.

[43] CHARLES FRIED, ORDER AND LAW 34 (1991).

[44] People for the American Way, Press Release, Truth a Frequent Casualty in the Estrada Nomination Battle (Feb. 24, 2003) (www.pfaw.org/pfaw/general/default.aspx?oid=8912).

Judge John M. Rogers, then a career lawyer in the Justice Department's Civil Division. Democrats never asked Judge Rogers about it during his confirmation hearing in 2002. The Judiciary Committee approved him by voice vote, with no Democrat recording a dissenting view. The full Senate confirmed him by voice vote, again with no Democrat opposition. Similarly, Charles Fried, who was Acting Solicitor General, was responsible for determining whether to file a brief in *Thornburgh* and what arguments to make. Yet Democrats gave him a free pass during his subsequent 1985 confirmation hearing to be Solicitor General. Fried was unanimously approved by the Judiciary Committee, and was confirmed by the full Senate by voice vote and without debate. Rogers and Fried were far more instrumental in developing the United States' position in *Thornburgh* than was Carolyn Kuhl. It is not easy to understand why a female nominee would be criticized for the same brief.

Kuhl's suggestion to Acting Solicitor General Fried that it would be appropriate to ask the Supreme Court to rethink *Roe v. Wade* had nothing to do with whether *Roe* was correctly decided as an original matter. Instead, it was based on Judge Kuhl's belief that the Justice Department's court filings should be consistent with the publicly stated positions of the President, and her calculation that alternative litigation tactics were likely to erode the Justice Department's credibility with the Supreme Court.

The President at the time *Thornburgh* was argued was Ronald Reagan, and President Reagan had long been on record with his opposition to *Roe v. Wade*. Judge Kuhl believed that it was appropriate for the briefs of the Justice Department—an arm of the Executive Branch—to reflect the views of the head of the Executive Branch. Reasonable people certainly can disagree about whether *Roe* was correctly decided (although Kuhl's recommendation was not made on this basis). But everyone can agree that Presidents are entitled to have their lawyers advance their views in court.

Second, Judge Kuhl feared that the Justice Department's past efforts to defend popularly enacted laws without directly criticizing *Roe* had undermined its credibility. In previous cases—in which Judge Kuhl was not involved—the Department's briefs seemed to accept *Roe*'s basic premise, but urged the Supreme Court to show extreme deference to legislatures when applying it. This position was not well received by the Supreme Court. During Solicitor General Rex Lee's oral argument in *City of Akron v. Akron Center for Reproductive Health*,[45] Justice Blackman "waved the brief in his face and, after asking if Lee had written it, demanded to know if he was asking that *Roe* be overruled . . . and, if not, if he was then asking that *Marbury v. Madison* be overruled."[46] Judge Kuhl did not want the Department's credibility to be further eroded, and believed it was better to be up-front with the Supreme Court about what the President's views were.

In the final analysis, Judge Kuhl's minimal involvement in *Thornburgh* reveals nothing about her personal legal or political views. She was a young attorney at the time, representing a client—the United

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[45] 462 U.S. 416 (1983).

[46] CHARLES FRIED, ORDER AND LAW 34 (1991).

States and ultimately the American people. She was a low-level official in an Administration led by a President who was avowedly in favor of modest, incremental limitations on the right to abortion, and she had an obligation to advance her client's views. It was not Carolyn Kuhl's place to second-guess the President.

Nor is there any reasonable basis to criticize Judge Kuhl for the fact that, as a Justice Department lawyer, she signed a brief in *Planned Parenthood v. Heckler*[47] defending Department of Health and Human Services (HHS) regulations that required federal grantees to notify a parent of a minor child before giving him or her contraceptives. Significantly, Congress had expressly endorsed the principle of parental involvement: "To the extent practical, entities which receive grants or contracts under this subsection shall encourage family participation in projects assisted under this subsection."[48]

It's worth emphasizing that the *Heckler* case did not implicate the constitutional right to privacy. The D.C. Circuit decision did not even cite *Roe v. Wade* or *Griswold v. Connecticut*, and stressed that it was "unnecessary to decide . . . whether the regulations . . . violate the constitutional privacy rights of minors."[49] The *Heckler* case simply presented a rudimentary question of administrative law—i.e., whether Congress had given HHS the power to issue the regulations.

Judge Kuhl had no role in developing the HHS regulation challenged in *Heckler*. She was simply a litigator at the Justice Department, and it was her job to represent HHS, the client agency. Federal agencies are entitled to their day in court, regardless of whether or not their lawyers agree with their policy choices. For years, Justice Department guidelines have made clear that Department lawyers have an obligation to defend acts of Congress and Executive Branch agencies. The Department will present an agency's views to the judiciary "whenever a reasonable argument can be made in [their] support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts."[50] This duty is no less keen in the case of statutes or regulations that may be controversial.

Make no mistake: HHS's policy views can be attributed to HHS and no one else; a government lawyer's arguments on behalf of a client agency should not be mistaken for her own personal beliefs. This is the teaching of the American Bar Association's legal ethics rules, which instruct that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of

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[47] 712 F.2d 650 (D.C. Cir. 1983).

[48] 42 U.S.C. § 300(a) (1983 version).

[49] *Heckler*, 712 F.2d at 654 n.21.

[50] 5 Op. Off. Legal Counsel 23, 25-26 (1981).

the client's political, economic, social or moral views or activities."[51] This view is shared by the editorial page of the *Washington Post*, which agrees that government lawyers should not be held accountable for the policy choices of their clients: "[The Justice Department] is obligated to defend acts of Congress and government policies where reasonable arguments can be made on their behalf. Those policies aren't always popular . . . . There's no merit, however, in opposing a nominee for having, as a government lawyer, represented the position of the United States."[52]

Criticizing Carolyn Kuhl for doing her job in *Heckler* threatens to produce a chilling effect that would undermine the quality of representation available to all federal entities. Justice Department lawyers would be reluctant to defend controversial acts of Congress or of administrative agencies for fear that their work product would be held against them in the future. The ultimate victim of such a chilling effect, of course, would not be the federal government—though Congress and the Executive Branch undoubtedly would suffer. It would be the American people, who would not be able to count on Justice Department lawyers to defend the policies that their representatives have enacted.

Perhaps the most spurious criticism against Judge Kuhl stems from the amicus brief she filed on behalf of a client in *Rust v. Sullivan*,[53] in which she defended the federal government's decision not to use taxpayer funds to subsidize abortion-related counseling. Kuhl became involved in *Rust* because she wanted to break into the male-dominated field of appellate-court advocacy. Her efforts to shatter this glass ceiling should be praised, not censured—especially by groups that purport to seek the advancement of women in American society.

After leaving the federal government and returning to California, Carolyn Kuhl wanted to develop a specialty in appellate law and a practice before the U.S. Supreme Court. She believed that *Rust* was a suitable case to begin doing so, because First Amendment cases are considered particularly prestigious by the nation's appellate bar. By seeking to develop a Supreme Court practice, Carolyn Kuhl was trying to enter a field that even today essentially is a men-only club. Almost all of the country's leading Supreme Court specialists are men: for example, Walter Dellinger, Lawrence Tribe, Larry Robbins, Seth Waxman, and Carter Phillips.

It was an especially difficult task for Carolyn Kuhl to establish appellate and Supreme Court specializations because she was based in Los Angeles, not Washington, DC. She therefore had to be on the lookout for any opportunity to work on any Supreme Court case. Democratic Senators have expressed their appreciation for how difficult it is to establish a Supreme Court practice, and have said that lawyers should not be faulted for seeking out such opportunities. During a February 5, 2003 Judiciary

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[51] Rule 1.2(b), Model Rules of Professional Conduct.

[52] WASH. POST, June 7, 2001.

[53] 550 U.S. 173 (1991).

Committee business meeting, Senator Feinstein remarked of Sixth Circuit nominee Jeffrey S. Sutton: "He said something that I have heard all my life from attorneys: well, I was trying to establish a Supreme Court practice and so I picked cases where I might be able to do that. Now, I have heard people say that informally all the time, and so I sort of gave him a mark for candor."

Finally, it is essential to keep in mind the narrow scope of the question presented to the Supreme Court in *Rust*. The case had nothing to do with whether there is a constitutional right to abortion; the amicus brief Judge Kuhl filed on behalf of her client did not even mention *Roe v. Wade*. Moreover, the regulation challenged in *Rust* did not prevent recipients of federal grants from engaging in abortion-related speech. It did no more than prevent them from using federal funds to do so. Grant recipients remained entirely free to discuss abortion with their clients; the regulations simply declined to subsidize that speech with taxpayer dollars.

Equally baffling is the special interest groups' determination to mischaracterize the Reagan Administration's amicus brief in *Meritor Savings Bank v. Vinson*[54]—a case in which the Justice Department took a bold and progressive stance in favor of women's rights in the workplace and against sexual harassment. Prior to 1985, federal law made it clear that sexist behavior was illegal if it caused a woman to lose her job or a promotion. But the Supreme Court had not ruled on whether sexual harassment standing alone violated the anti-discrimination laws. (Indeed, the district court in *Meritor* had dismissed the case because the plaintiff alleged sexual advances that did not involve job-related threats.)

In *Meritor*, Kuhl (as Deputy Solicitor General) and the Justice Department submitted an amicus brief siding with the legal theory of the plaintiff, an African-American woman who had suffered on-the-job sexual harassment when she refused a supervisor's advances. The Department argued that Title VII should not be limited to harassment in which the victim suffers a loss of a job or other economic benefits. Specifically, its position was that Title VII has a broad remedial purpose and seeks to eliminate any discrimination that affects the "terms, conditions, or privileges of employment." Thus "unwelcome sexual advances" by a male co-worker can create a "hostile working environment" for women, and such a showing can create liability under Title VII.[55] The Justice Department's brief in *Meritor* was in accord with briefs filed by several other amici, including the Women's Bar Association of New York, and a group of state Attorneys General including Joseph Lieberman of Connecticut and Hubert H. Humphrey, III of Minnesota.

In a landmark decision authored by Justice Rehnquist, the Supreme Court accepted the

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[54] 477 U.S. 57 (1986).

[55] One interest group wrongly proposes that the government's brief adopted the reasoning of the district court. *See* NWLC REPORT at 4. In reality the cited quotations come from the district court's opinion, and not from the Justice Department's brief. The implication that the government would have required proof of physical force to support a finding of sexual harassment is patently false, and finds no support in the government's brief."

Government's argument and held that pervasive sexual harassment that alters a victim's employment by creating an abusive work environment is actionable under Title VII. At the time, the Court's ruling was "hailed by women's groups as a major victory."[56] Rosalie Gaull Silberman, a member of the EEOC and Judge Kuhl's client in the case, stated: "This is a tremendous victory for working women. We are particularly pleased that the Court relied so heavily on the commission's guidelines and the government's brief. Today's decision will provide greater protection for women and greater incentives for employers to provide that protection."[57] Judge Kuhl was on record at the time as stating that "we're very happy" with the decision.[58]

Some interest groups that were pleased with the *Meritor* decision at the time it was handed down now propose that the government's brief did not go far enough. In their view, employers should be liable whenever harassment takes place—even if the employer had no knowledge that it was occurring. The government's position was that employers are not *automatically* liable for the actions of their supervisors, and the facts in each case must be examined in light of traditional agency principles before assigning liability. This, it bears emphasizing, was the position the Supreme Court ultimately adopted. But in the final analysis, Judge Kuhl's participation in *Meritor* represents an effort to ensure that sexual harassment in the workplace was prohibited by Title VII. Former EEOC Commissioner Fred Alvarez puts it best: "Today, we can say that [the government's stand against sexual harassment] was a no-brainer. But it wasn't a no-brainer then."[59]

Judge Kuhl's advocacy in the 1993 Virginia Military Institute case is another example of her efforts to protect the interests of women. In that case, Judge Kuhl, who had left the Justice Department and returned to private practice, was hired by three women's colleges that wanted to preserve the ability of girls and women to attend single-sex schools. The women's colleges feared that courts would hold *all* single-sex educational programs to be unconstitutional, and therefore hired Kuhl's law firm to advocate the benefits of single-sex education for women.

Contrary to one group's assertion that Kuhl's clients "urg[ed] the Supreme Court to uphold the

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[56] Al Kamen, *Court Rules Firms May Be Liable for Sexual Harassment*, WASH. POST, June 20, 1986, at A1. For instance, the National Organization for Women called the decision "on balance a victory for working or employed women." Stuart Taylor, *Sex Harassment on Job Is Illegal*, N.Y. TIMES, June 20, 1986, at A1.

[57] Richard Carelli, *Court Rules on the Job Sexual Harassment Illegal*, ASSOC. PRESS, June 19, 1986.

[58] Stuart Taylor, *Sex Harassment on Job Is Illegal*, N.Y. TIMES, June 20, 1986, at A1.

[59] David Savage, *Thomas Fought Workplace Harassment*, L.A. TIMES, Oct. 10, 1991, at A6 (explaining that Government's substantive position was determined by Solicitor General Charles Fried and Clarence Thomas, then-Chairman of the EEOC). Indeed, Judge Kuhl was the fourth person listed on the amicus brief after then Solicitor General Charles Fried and Assistant Attorneys General Reynolds and Willard.

constitutionality of the exclusion of women from VMI,"[60] the brief focused exclusively on preserving the existence of women's colleges. The women's colleges argued that: "A diverse body of literature suggests that women attending single-sex schools may be even more likely than their peers at coeducational schools to pursue male-dominated careers."[61] The brief at issue did not contain a single reference, either positive or negative, to VMI or any other all-male institution: "This Court should grant the petition for writ of *certiorari* in this case and uphold the constitutionality of single-sex education *for women* before the current legal uncertainty becomes a tool to eliminate institutions such as the *amici*."[62]

Judge Kuhl's clients were not alone in their support of single-sex education for women. Representatives of inner-city single-sex academies, as well as other women's colleges—such as Wells College, Randolph-Macon Woman's College, Sweet Briar College, and Hollins College—all filed *amicus* briefs that advocated a position nearly identical to that contained in Judge Kuhl's brief. Susan Estrich, a well-known liberal and Michael Dukakis' presidential campaign manager, went one step further in 1995 and filed a brief in support of VMI's legal position.[63] Professor Estrich argued that single sex education benefits both men and women, and that VMI should be allowed to remain exclusively male.

Additionally, Judge Kuhl's brief was limited to the narrow subject of whether the Supreme Court should grant *certiorari* in the VMI case. The three women's colleges favored Supreme Court review because they wanted a clear pronouncement that single-sex women's colleges did not violate the lower court's order. The Court denied VMI's *certiorari* petition, and the merits were not addressed until two years later.[64] Given the case's procedural posture, and the task Judge Kuhl was hired to perform, there was no need to fully address the merits of the case.

Confirm Carolyn Kuhl Now!

For the past two years, Democrats in the Senate have spoken of the need to bring "balance" to the federal judiciary. Now's their chance to put their money where their mouth is. As Senator Schumer has affirmed, "[s]tandards cannot only apply when they help achieve the desired outcome." The Ninth Circuit—home to the Pledge of Allegiance decision and other notorious jurisprudential outrages—is "way

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[60] NWLC REPORT at 6.

[61] Amicus Brief at 11.

[62] Amicus Brief at 2.

[63] Brief for Amici Curiae Kenneth E. Clark at 3, *United States v. Virginia*, 518 U.S. 515 (1996) (No. 94-1941).

[64] As conceded by the NWLC in a footnote, when the Supreme Court took up the merits of the case some two years later, Judge Kuhl did not participate in any of the briefing. *See* NWLC REPORT at n.2.

out of the mainstream on the left side,"[65] and it is desperately in need of the balance that a mainstream judge like Carolyn B. Kuhl would bring.

For as a state-court judge in California, Kuhl has established a sterling record of treating all litigants fairly, regardless of their station in life, and regardless of what her own political views may happen to be. Despite having two years to comb through Judge Kuhl's judicial record, the Washington special interests have been unable to find any disqualifiers, and therefore have been reduced to criticizing the positions her clients took when she was a practicing lawyer. But this cynical tactic only proves that Judge Kuhl is committed to—and does—leave behind her personal views when she takes the bench. We eagerly anticipate the day she joins the Ninth Circuit, and we call on the Senate to confirm her immediately.

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[65] *Congressional Record* S3694 (March 13, 2003) (statement of Sen. Schumer).